

***Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554***

In the Matter of)	
)	
Redesignation of the 17.7-19.7 GHz Fre-)	IB Docket No. 98-172
quency Band, Blanket Licensing of Satellite)	RM-9005
Earth Stations in the 17.7-20.2 GHz and)	RM-9118
27.5-30.0 GHz Frequency Bands, and the)	
Allocation of Additional Spectrum in the 17.3-)	
17.8 GHz and 24.75-25.25 GHz Frequency)	
Bands for Broadcast Satellite-Service Use)	

To: The Commission, *en banc*

COMMENTS OF AESCO SYSTEMS, INC.

AESCO SYSTEMS, INC. (AESCO) hereby submits its comments to the Federal Communications Commission in response to its Notice of Proposed Rulemaking (NPRM) in the captioned proceeding, FCC 98-235, released September 18, 1998. For the reasons set forth below, AESCO is grievously injured by the Commission's adoption of September 18, 1998, as the cutoff for affording co-primary status to fixed private cable microwave stations in the 18.3-18.55 GHz band and strenuously urges the Commission to abandon that cutoff date in its final allocation of Geostationary Orbit Fixed Satellite Service (GSO/FSS) spectrum. Additionally, AESCO believes that the redesignation of the 17.7-18.8 GHz band as proposed in the NPRM is substantially unworkable for either terrestrial fixed or GSO/FSS licensees and properly should be modified so as to render the September 18th cutoff date unnecessary. As its comments herein, AESCO respectfully states:

AESCO is a private cable operator in Philadelphia providing service to various multiple dwelling units (MDUs) via terrestrial fixed microwave stations in the 18 GHz band directly

affected by the redesignation proposed in the NPRM. AESCO has applications pending before the Commission for 17 paths in the 18.142-18.580 GHz band which were well along the pipeline as of September 18, 1998, but which were not actually filed at the Commission until after that date. Moreover, applications for 4 additional paths in the same band are currently in the pipeline and are expected to be filed at the Commission in the near future. Accordingly, all of these stations are directly affected by the September 18 cutoff for co-primary status, and AESCO's business accordingly is threatened with grievous and irreparable injury by reason of the cutoff.

As explained in the Emergency Request for Immediate Relief filed herein by The Independent Cable & Telecommunications Association on November 5, 1998, the process of planning 18 GHz private cable systems leading up to the preparation of applications for the microwave station licenses requires at least several months and the investment of thousands of dollars. The process necessarily begins with the negotiation of site leases and corresponding service agreements at the MPU locations where service ultimately will be provided.

As a practical matter, essentially final negotiation of site leases are required in order to obtain reasonable assurance of site availability necessary for filing an application, and that, in turn, requires the private cable operator to enter into a binding service agreement for the MPU at the same time. Stated another way, a private cable operator cannot get an MPU landlord to give reasonable assurance of site availability for purposes of preparing and filing an FCC application unless the operator commits to providing service to the MPU at the same time, usually for a minimum of five years in order to have the chance to recoup the operator's initial investment..

This sequence vividly underscores why the September 18th cutoff is so injurious and punitive to AESCO and other private cable operators. AESCO had already entered into contracts to provide private cable service at its proposed locations over the *entire* 18.142-18.580

GHz band *before* the Commission adopted the September 18th cutoff. Stated another way, the Commission has put AESCO in the position of breaching its existing contractual agreements with MPUs, and has threatened AESCO with the complete destruction of its business, without giving AESCO any prior notice or opportunity to be heard.

Further, apart from being forced to breach its contractual obligations to provide service as a result of the September 18 cutoff, the cutoff also precludes AESCO from being a viable competitor to coaxial cable systems once the ubiquitous earth stations are deployed pursuant to the NPRM's reallocation. This is so because once the earth stations' primary status is invoked, AESCO will be left with only 158 MHz of spectrum (18.142-18.3 GHz), or only about 25 channels of programming (6 MHz per channel).

As the Commission well knows, coaxial cable systems have been routinely upgrading to 550 MHz and 750 MHz systems, and private cable operators simply cannot hope to compete with them effectively without access to a reasonably comparable amount of contiguous spectrum. Nonetheless, when the ubiquitous earth stations are deployed pursuant to the NPRM's reallocation, AESCO will be forced to shut down nearly two-thirds of its channel capacity (the portion in the 18.3-18.55 GHz band), leaving it with only 25 channels of programming to compete against the 70 and more channels offered by the coaxial cable operator.

AESCO also points out that the cutoff is impossible to justify in light of the well-established Commission policy of promoting competition to conventional coaxial cable operators. The Commission has repeatedly acknowledged this policy and its importance to the American public;¹ and it forcefully reaffirmed its views in this regard when it granted the

¹ See, e.g., *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming (First Report)*, 9 FCC Rcd 7442, 7445-7447 (FCC 1994) (cited hereinafter as the First Report).

MDS/ITFS wireless cable industry a declaratory ruling to facilitate the deployment of digital modulation techniques in MDS and ITFS stations:

[I]n providing communications services, the public interest is better served by competition. A competitive industry framework promotes lower prices for services, provides incentives for operators to improve those services and stimulates economic growth. An essential component of competition is choice. As we recognized in our recent report to Congress, consumers in the market for video programming do not have enough choices. Although competing technologies have made major strides ... the cable television market remains largely noncompetitive.²

Chairman Kennard himself also underscored the importance of this public policy when he recently stated in an interview that the Commission would not freeze or roll back cable television prices prior to pricing deregulation next March, notwithstanding his earlier and other widespread acknowledgement that ~~A~~cable rates are rising too fast~~=~~.³ Thus, introducing a competitive spur to coaxial cable systems in the local markets, such as offered by AESCOs and other operators' private cable systems, remains the best available public tool for curbing the very rates that otherwise are ~~A~~rising too fast~~=~~.

In adopting the September 18th cutoff, the Commission did not even acknowledge the severe adverse impact this action would have on its important policy of fostering competition to cable systems, much less determine whether such adverse impact would be outweighed by the putative benefits of its proposed spectrum reallocation. The Commission properly should do so, however; and when it does, AESCO believes the Commission will conclude that neither the September 18th cutoff nor the proposed reallocation itself is in the public interest.

² *Declaratory Ruling and Order, supra*, 11 FCC Rcd at 18841, citing *Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act* and *Competitive Bidding (Notice of Proposed Rulemaking)*, 9 FCC Rcd 7665, 7666 (FCC 1994).

³ ~~A~~FCC Chief Declines to Curb Cable Prices,~~=~~ *The Washington Post*, p. F1, Col. 5 (May 15, 1998).

AESCO further respectfully submits that the September 18th cutoff is unlawful as well as improvident. When AESCO planned its private cable system and began implementing it, a Commission rule was in force that AESCO's system is entitled to be licensed on a primary basis and be protected from harmful interference. However, without affording AESCO and other affected parties any notice or opportunity to be heard, the Commission has abrogated that rule and has denied AESCO the benefits of the interference protection the rule was intended to provide.

Analyzed one way, the Commission has abrogated its rule without observing the procedures required by the Administrative Procedures Act, 5 U.S.C. §553. Analyzed another way, the Commission has engaged in retroactive rulemaking by waiting to formally adopt the cutoff at the conclusion of the rulemaking, while applying it retroactively to September 18, 1998. However, the Commission has not and cannot plausibly justify such retroactive application as required by law.⁴ Accordingly, no matter which way the Commission chooses to explain its actions, the September 18th cutoff plainly contravenes the Commission's legal obligations.

Finally, AESCO believes that the proposed reallocation spectrum is not practicably workable for either the GSO/FSS or terrestrial private cable licensees, and should be substantially modified in any event. AESCO has participated in several industry meetings attempting to reach a compromise allocation plan that is acceptable to both groups of licensees, and understands that various proposals for doing so will be submitted as part of the initial comments herein. AESCO looks forward to reviewing these proposed modifications and

⁴ See, e.g., *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947); *Retail, Wholesale & Department Store Union v. NLRB*, 466 U.S. 380, 389-90 (D.C.Cir. 1972); *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1554-55 (D.C.Cir. 1987).

providing the Commission with AESCO's comments thereon at the reply comment stage.

Accordingly, when the Commission modifies its plan to accommodate the concerns of affected parties, the Commission will have the opportunity to establish an allocation plan that continues to afford primary status to terrestrial private cable operators in the 18.142-18.580 GHz band.

AESCO respectfully urges the Commission to take advantage of this opportunity and thus to wholly eliminate the need for *any* cutoff date in the 18.3-18.55 GHz band such as adopted in the NPRM.

Respectfully submitted,

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